

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 30 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KIRK GRABLE,

Defendant - Appellant.

No. 05-30360

D.C. No. CR-01-00128-a-JWS/JD

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted July 27, 2006
Anchorage, Alaska

Before: KOZINSKI, BERZON, and TALLMAN, Circuit Judges.

Kirk Grable was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and of possession of a machine gun, in violation of 18 U.S.C. § 922(o), after several firearms were found in the bedroom

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

of his then-girlfriend, Matrona Nevzuroff (“Matrona”), on March 10, 2001. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

The district court did not abuse its discretion when it admitted under Federal Rules of Evidence 403 and 404(b) two prior acts in 1996 and 1997 in which Grable stored firearms at the Nevzuroff family trailer. Evidence of the two incidents was proper under *United States v. Murillo*, 255 F.3d 1169 (9th Cir. 2001), which articulates a four-part test the district court must use to determine the admissibility of other acts evidence. *Id.* at 1175. The government provided sufficient evidence that Grable committed the conduct constituting both incidents. The evidence was directly material to whether Grable had control over weapons found at the Nevzuroff home, and whether Matrona assisted Grable in hiding weapons in her bedroom. The incidents were not too remote in time, and were substantially similar to the conduct that led to this conviction. Additionally, the evidence’s probative value was not outweighed by the danger of unfair prejudice to the defendant.

The district court also did not abuse its discretion when it admitted testimony about Grable’s contentious and controlling relationship with Matrona and her family, nor when it denied Grable’s motion for mistrial following the admission of this testimony. This was not improper character evidence under Rule

404(a), but was admitted to counter Grable's defense, laid out in his trial brief and opening statement, that (1) Matrona or one of her family members owned the weapons found in Matrona's bedroom, and (2) Grable had no control over or access to the Nevzuroff home. Questions of credibility were resolved adversely to Grable and the dissent's view of the facts. Because a jury convicted the defendant, we must view the evidence in the light most favorable to the prosecution. *United States v. Iverson*, 162 F.3d 1015, 1018 (9th Cir. 1998). The evidence was sufficient to support the theory that Grable's control over Matrona induced her to render criminal assistance to him.

Nor did the district court abuse its discretion in denying Grable's motion for mistrial after Matrona made an inadvertent reference during her testimony to illegal controlled substances found in her bedroom on March 10, 2001. The district court is in the best position to determine whether an incident merits a mistrial, *United States v. Gardner*, 611 F.2d 770, 777 (9th Cir. 1980), and here the district court determined that the inadmissible evidence was insubstantial in relation to the admissible evidence presented during trial. Matrona's passing reference to drugs was harmless error, and mistrial was not warranted where the improper evidence was unsolicited, minimal, and not unfairly prejudicial. *See United States v. Aichele*, 941 F.2d 761, 765 (9th Cir. 1991) ("If the case against a defendant is very

strong, though not overwhelming, and the reviewing court is unconvinced that the admission of the evidence influenced the outcome of the case, the court may uphold the verdict.”).

AFFIRMED.